

These are the tentative rulings for civil law and motion matters set for Tuesday, July 16, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, July 15, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0033709 Atlantic Credit and Finance Inc. vs. Myhre, Janice K.

Plaintiff's Motion to Compel Answers to Post-Judgment Interrogatories is granted. Defendant shall serve verified responses to the subject interrogatories, without objection, by no later than August 13, 2013. Plaintiff's request for sanctions is denied because the motion was not opposed. Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. *See* Code Civ. Proc. § 2030.290(c). Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

2. M-CV-0057251 Koehler, Robert F., Jr. vs. Doerr, Maria

Plaintiff's Motion for Order for Clerk's Entry of Defendant's Default and Entry of Judgment is denied. Although Code of Civil Procedure section 1014 states that a defendant appears in the action when defendant's attorney gives notice of appearance, this code section contemplates notice given to the court, and does not imply that a letter between counsel may by itself constitute submission to the jurisdiction of the court. *See Anglo-Californian Bank v. Griswold* (1908) 153 Cal. 692. Further, although defendant's former law firm did agree to accept service on defendant's behalf, the "written agreement" referenced in the March 7, 2013 letter expressly requested and contemplated service by notice and acknowledgement of receipt, which was not properly completed in this case.

Defendant's request for sanctions pursuant to Code of Civil Procedure section 128.5 is denied. This statute has no applicability to cases filed after December 31, 1994. Code Civ. Proc. § 128.5(b)(1); *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 807.

The court notes that defendant has at this point made a general appearance in this action by opposing plaintiff's ex parte application, paying her first appearance fee, filing an opposition to the instant motion, and affirmatively seeking sanctions against plaintiff. Defendant is directed to file and serve her answer to the complaint by no later than July 30, 2013.

3. M-CV-0057545 No. California Coll. Service vs. Hoseit, Max, et al

Cross-defendant Buzz Garcia's ("Garcia's") three Motions to Strike Cross-Complaint are denied. Generally, motions to strike are used to reach defects or objections to the pleadings that are not challengeable on demurrer. The failure to state a valid cause of action because the pleading discloses that the purported cause of action is barred by the statute of limitations is a defect that is challenged by demurrer, not a motion to strike.

As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice. Code Civ. Proc. § 437. Garcia's motion is largely based on the bill of particulars served by cross-complainants. Although a bill of particulars may be considered as incorporated into the complaint for purposes of determining plaintiff's right to recovery, or the admissibility of evidence at trial, Garcia provides no support for his contention that it may be evaluated for purposes of a demurrer or motion to strike. As the bill of particulars is not a document of which the court may take judicial notice, it may not be considered in ruling on this motion.

Garcia's request for judicial notice is granted as to Exhibits A, F and G, and otherwise denied. With respect to Exhibits A, F and G, the court takes judicial notice of the existence of the documents, but not the truth of the matters stated therein. The court declines to take judicial notice of the California and Nevada Secretary of State website screen shots. *See L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 180, fn. 2. Clearly the court may not consider statements made in the declaration of Garcia's counsel regarding whether Portola Hospitality, LLC has changed its name. Code Civ. Proc. § 437. For purposes of the motion to strike, the court cannot conclude that cross-complainant Portola Hospitality, LLC is a foreign limited liability company that has failed to comply with Corporations Code section 2105.

Garcia shall file and serve his answer to the cross-complaint by no later than July 30, 2013. If oral argument is requested, cross-defendants' request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

4. M-CV-0058823 Keh, Benjamin vs. Langsjoen, Jon, et al

Appearance is required on defendants' Motion to Set Aside Default. Proof of service establishing timely service of the motion on plaintiff per the court's ex parte order dated July 8, 2013 must be filed no later than the time of the hearing.

5. S-CV-0021433 Ghotra, Rawail S., et al vs. Stahr, Clifford D., et al

Defendants and cross-complainants' request for judicial notice is granted. Defendants and cross-complainants' Motion for Entry of Judgment and to Retain Jurisdiction to Enforce Settlement is granted. Although plaintiffs oppose the motion, they do not dispute their execution of the settlement agreement at issue, or any material terms of the agreement. *See Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430-1432. Nor do plaintiffs dispute the enforceability of the agreement for the purpose of opposing the instant motion. *See Corkland v. Boscoe* (1984) 156 Cal.App.3d 989, 995. The settlement at issue was signed by all parties sought to be charged, and expressly provides for enforcement pursuant to Code of Civil Procedure section 664.6. Moving parties need not establish a breach of the settlement agreement. The court is authorized to enter judgment pursuant to the settlement regardless of whether the settlement's obligations were performed, breached or excused. *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1184-1185.

Judgment shall be entered pursuant to the June 2009 Partial Mediation Settlement Agreement and the June 2010 Final Mediation Settlement Agreement identified in the moving papers. The court shall retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. Code Civ. Proc. § 664.6.

6. S-CV-0026797 Pollack, Kirsten, et al vs. Rocklin Foreign Car, et al

Plaintiff's Objections to Evidence, Nos. 1-8 and 12 are overruled. Plaintiff's Objections to Evidence, Nos. 9-11 are sustained. Defendant's Objections to Evidence, Nos. 1-26 are overruled. Defendant's Objections to Evidence, Nos. 27-29 are sustained.

Defendant Teraflex, Inc. dba Tera Manufacturing's ("Teraflex's") Motion for Summary Judgment or, Alternatively, Summary Adjudication, is denied. The party seeking summary judgment bears the burden of showing there is no triable issue of material fact, and that the party is entitled to judgment as a matter of law. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. The moving party has the burden of showing, by affidavit, facts establishing every element necessary to sustain a judgment in favor of the party. *Consumer Cause, Inc. v. Smilecare* (2001) 91 Cal.App.4th 454, 468. A party to the action may also move for summary adjudication if that party contends there is no merit to one or more of the causes of action. Code Civ. Proc. §437c(f)(1). In reviewing a motion for summary judgment, the trial court must view the supporting evidence, and inferences reasonably drawn from such evidence, in the light most favorable to the opposing party. *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at 843.

Teraflex's motion is based primarily on its assertion that it did not manufacture the quick release kit at issue. However, the presence of a British "R" bolt in place of the removable SAE bolt on the driver's side link, and the absence of a removable steel sleeve on the driver's side of the vehicle do not conclusively establish that Teraflex did not manufacture the product. Significantly, an SAE bolt and steel sleeve were both present on the passenger side of the vehicle. The declaration of Bryce Calvin does not establish that the kit found on plaintiff's vehicle was not designed, manufactured or sold by Teraflex. Mr. Calvin does not establish requisite foundation for statements regarding kits manufactured and sold prior to his employment with Teraflex. Further, plaintiff raises a triable issue of material fact regarding whether Teraflex

was the manufacturer of the quick release kit present in the subject vehicle at the time of the incident. (Pltf. RSSUF 16, 19, 23.)

Teraflex also argues that the presence of an R bolt, and absence of the removable steel sleeve on the driver's side constituted a misuse or modification of the product which was not reasonably foreseeable to Teraflex. Plaintiff establishes a triable issue of material fact regarding whether the changes present in the quick release kit at issue were reasonably foreseeable. Further, Teraflex does not establish that the changes present in the quick release kit were the proximate cause of the incident. (Pltf. RSSUF 91; Pltf. ASF 4, 19, 22, 23, 51, 52.)

Finally, Teraflex is not entitled to summary adjudication based on the affirmative defense of unclean hands. Teraflex does not establish as a matter of law that plaintiff is barred from any remedy based on her own unconscionable or unlawful conduct.

7. S-CV-0028931 Herdegen, Mary Louise, et al vs. Kumar, Ashok, et al

Defendant Neena Khullar's ("Khullar's") Motion for Summary Judgment, or Alternatively for Summary Adjudication is denied.

Khullar seeks summary adjudication of the "cause of action for negligent entrustment". Upon review of the complaint in this action, there is no separate cause of action for negligent entrustment. The complaint states a cause of action for negligence against Khullar and her ex-husband, Ashok Kumar ("Kumar"). The negligence cause of action alleges that Khullar and Kumar "negligently, carelessly, recklessly and/or unlawfully owned, leased, rented, entrusted, managed, maintained, repaired, drove and/or operated [the vehicle involved in the incident]". (Complt., ¶ 7.) Negligent entrustment is only one of several negligent acts alleged against Khullar for purposes of the cause of action for negligence. Summary adjudication must completely dispose of the cause of action, defense, damage claim or duty issue to which it is directed. Code Civ. Proc. § 437c(f)(1). Khullar makes no attempt to address the numerous other acts alleged in support of the negligence cause of action. As there is no separately stated cause of action for negligent entrustment, and it does not otherwise appear that adjudication of the issue of negligent entrustment would completely dispose of the negligence cause of action stated against Khullar, summary adjudication is not permitted.

Khullar also seeks summary adjudication of "plaintiffs' theory of liability as it relates to the agency relationship between defendants". (Notice of Motion and Motion for Summary Judgment at 2:22-25.) As noted above, a party may move for summary adjudication only as to a cause of action, affirmative defense, claim for punitive damages, or issue of duty. Code Civ. Proc. § 437c(f)(1). The Code does not provide for adjudication of a "theory of liability" that does not completely dispose of a cause of action, affirmative defense, claim for punitive damages, or issue of duty. Even if the court did consider adjudication of the issue of agency, disputed material facts exist regarding whether Kumar was acting as Khullar's agent at the time of the incident. (Pltf. AMDF 2A-5A; *see Perry v. McLaughlin* (1931) 212 Cal. 1, 14.)

For the reasons set forth above, Khullar is also not entitled to summary judgment in this action. A motion for summary judgment asks the court to determine that the entire action has no

merit, and to terminate the action without the necessity of a trial. Code Civ. Proc. § 437c(a). Given that Khullar concedes that she is not asking the court to dismiss her entirely from the case, and would have liability as the owner of the vehicle, she would not be entitled to summary judgment in any event.

8. S-CV-0030251 Wells Fargo Merchant Services, LLC vs. JT Tire & Wheel Inc.

Mohammed Tariq and JT Tire and Wheel Inc.'s Motion to Quash Deposition Subpoena for Production of Personal Records is granted in part. The deposition subpoena is quashed as to Request No. 2, with respect to any accounts in the name of individual Mohammed Tariq. The subpoena is also quashed to the extent any other categories of the subpoena seek documents obtained from accounts in the name of individual Mohammed Tariq.

9. S-CV-0030677 Macy's West Stores, Inc., et al vs. Roseville Shoppingtown

The Demurrer to the Cross-Complaint is continued to July 30, 2013 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

10. S-CV-0030737 Lee, Leron vs. Webb, James, et al

Defendant Candy Webb's Motion to Compel Arbitration is denied. The distributor agreement at issue was signed by plaintiff Leron Lee ("Lee") on February 9, 2004. It does not contain an agreement to arbitrate disputes, and does not on its face incorporate any "Distributor Policies and Procedures". Further, based on the declaration of Jeff Ranson, the Distributor Policies and Procedures and Compensation Plan was effective as of "Winter 2004" which was after Lee signed the agreement. Therefore, there is no evidence that Lee agreed to arbitrate any disputes arising out of the distributorship.

11. S-CV-0030841 Austin, William, et al vs. Morrison Homes, Inc., et al

The unopposed Motion for Determination of Good Faith Settlement of Fletcher Plumbing, Inc. is granted. Based on the factors set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling party's proportionate share of liability for plaintiff's injuries, and therefore is in good faith within the meaning of Code of Civil Procedure sections 877 and 877.6.

If oral argument is requested, moving party's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

12. S-CV-0031332 Tsarnas, Alex vs. City of Roseville, et al

The Motion to Quash Subpoena was dropped.

13. S-CV-0031355 DeBono, Jeri vs. Machado, Anthony F.

The Motion to Compel is dropped. The case has been dismissed.

14. S-CV-0031774 Baldwin, Tiffany vs. Richardson, Aaron James, et al

Plaintiff's Motion to Consolidate is granted. Plaintiff adequately demonstrates common questions of law and fact justifying consolidation of Placer County Superior Court Case No. SCV-0031774 and Placer County Superior Court Case No. SCV-0032894.

Case No. SCV-0031774 shall be the lead case. **The trial date, mandatory settlement conference, and civil trial conference currently set in SCV-0031774 are hereby vacated. A case management conference shall be set for September 17, 2013 at 10:00 a.m. in Department 40.**

If oral argument is requested, defendant James Richardson's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

15. S-CV-0032153 Dunivan, Ruth, et al vs. BBC Family Eateries, LLC

Defendant's Motion to Compel Answers to Form Interrogatories, Special Interrogatories, and Demand for Production is granted. Plaintiffs shall serve verified responses to the subject discovery requests, without objections, by no later than August 6, 2013. Defendant's request for sanctions is denied because the motion was not opposed. Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. *See* Code Civ. Proc. § 2030.290(c). Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

16. S-CV-0032463 Tahoe Residents United for Safe Transit vs. County of Placer

The Demurrers to the Amended Petition and Motion to Strike are continued to August 8, 2013 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

17. S-CV-0032633 Financial Pacific Leasing vs. Gustavson Ramirez Dental Corp.

The Applications for Right to Attach Orders and Application for Writ of Possession were continued to August 27, 2013 at 8:30 a.m. in Department 40.

18. S-CV-0032913 Madsen, Stuart J. vs. Nationstar Mortgage, LLC, et al

The unopposed OSC re Preliminary Injunction is granted. The court may grant a preliminary injunction when it appears from the complaint that plaintiff is entitled to the

demanded relief and the plaintiff would suffer irreparable injury if the enjoined action were allowed to proceed. Code Civ. Proc. § 526(a). Foreclosure of real property may be enjoined under the same elements applicable for other requests for injunctive relief, namely after: (1) a balancing of the hardships of the parties; and (2) a showing by the plaintiff of a reasonable probability of prevailing on the merits. *Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 824. Plaintiff bears the burden of showing he would be harmed if the preliminary injunction were not granted. *Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838.

Plaintiff contends the hardship is the ultimate loss of real property. The harm to the defendant is the loss of opportunity to proceed with the foreclosure sale along with the loss of any proceeds from the sale. The hardships in this case favor plaintiff. Plaintiff must also show a reasonable probability that he will prevail on the merits of his action. Taking into account plaintiff's evidence that defendant improperly failed to credit plaintiff for property taxes that have been paid, and subsequently imposed penalties and a forced escrow on the loans at issue without proper basis to do so, as well as the lack of opposition by defendants, the court finds a reasonable probability of success in the action.

If the preliminary injunction is granted, the court must require an undertaking. Code Civ. Proc. § 529. The bond is to cover any damages to the defendant caused by issuance of the injunction, if it is finally determined that plaintiff was not entitled to the injunction. Code Civ. Proc. § 529; *Top Cat Productions, Inc. v. Michael's Los Feliz* (2002) 102 Cal.App.4th 474, 478. The granting of the preliminary injunction in this case shall be conditioned upon plaintiff's posting of an undertaking with the clerk of the court in the amount of \$2,500 by no later than July 31, 2013.

19. S-CV-0032921 City of Lincoln vs. Beazer Homes USA, Inc., et al

Defendant Beazer Homes Holding Corp.'s ("Beazer's") Demurrer to Plaintiff's Complaint is overruled.

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. A general demurrer lies where the dates alleged in the complaint show the action is barred by the statute of limitations. However, the running of the statute must appear "clearly and affirmatively" from the dates alleged. It is not enough that the complaint *might* be barred. *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.

The complaint does not disclose on its face that each cause of action asserted therein is barred by the applicable statute of limitations. Government Code section 66499.37 does not apply to the claims asserted as plaintiff does not challenge any decision of either a legislative or advisory entity. For purposes of Code of Civil Procedure section 337, the statute of limitations runs from the date of the breach. Although the complaint alleges that Beazer deposited \$360,690 with the City on or around January 31, 2003, the complaint also alleges that Beazer knew and acknowledged that this amount did not represent the final costs relating to construction of the soundwall. (Complt., ¶ 35.) The complaint alleges that plaintiff informed Beazer that its deposit

was inadequate, and demanded payment for proper funding, but does not allege any dates of such communications. (*Id.*, ¶¶ 41, 43.) The complaint also alleges that plaintiff entered into an agreement with Caltrans on November 6, 2007 for construction of the soundwall for \$1.4 million, but the complaint does not disclose on its face that Beazer's payment was demanded or due at this time. As the running of the statute does not appear clearly and affirmatively from the allegations of the complaint, the demurrer based on the statute of limitations is overruled. Further, as the complaint does not disclose on its face the date that performance was due, the demurrer based on the affirmative defense of laches is overruled.

The first cause of action for breach of contract, and second cause of action for breach of the implied covenant of good faith and fair dealing, are adequately pleaded. A demurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond; i.e., defendant cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against it. *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616. Allegations relating to Resolution No. 2003-163 do not create an ambiguity or inconsistency in the complaint.

The third cause of action for negligence states a valid cause of action. The same wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts. *N. Am. Chem. Co. v. Superior Court* (1997) 59 Cal. App. 4th 764, 774. Pursuant to *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 376, plaintiff adequately alleges defendant's negligent failure to observe common law duties owed pursuant to the contract at issue. Cases cited by defendant in its opposition do not address plaintiff's burden at the pleading stage.

Beazer shall file and serve its answer to the complaint by no later than July 30, 2013.

20. S-CV-0032963 Ghotra, Rawail S., et al vs. Stahr, Clifford D., et al

Defendant Clifford D. Stahr's ("Stahr's") request for judicial notice is granted as to Items 1, 2, 4-5, 10, 11, 14 and 16. The request for judicial notice is denied as to Items 3, 6-9, 12-13 and 15. The settlement agreements, arbitrator rulings, and letters and emails from Judge Hill do not appear to be records of any court of this state pursuant to Evidence Code section 452(d). Even as to documents of which the court takes judicial notice, the court takes judicial notice of the existence of the documents, but not the truth of the matters stated therein.

Stahr's Demurrer to the Complaint is overruled. A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint adequately alleges that plaintiffs are entitled to declaratory relief with respect to the Arbitration Agreement between the parties. This cause of action is not duplicative of any claim asserted in the prior action.

Stahr shall file and serve his answer to the complaint by no later than July 30, 2013. If oral argument is requested, plaintiffs' request for telephonic appearance is granted. Effective

July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

21. S-CV-0033155 Becker, Nathan - In Re the Petition of

The Petition for Compromise of Minor's Claim is continued to August 6, 2013 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

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